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Convention on the Rights of Persons with Disabilities

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Committee on the Rights of Persons with Disabilities

Views adopted by the Committee under article 5 of the Optional Protocol, concerning communication No. 26/2014*, **

Communication submitted by:	Simon Bacher (represented by Viktoria Bacher, his twin sister and legal tutor)
Alleged victim:	Simon Bacher
State party:	Austria
Date of communication:	8 February 2014 (initial submission)
Document references:	Decision taken pursuant to rule 70 of the Committee's rules of procedure, transmitted to the State party on 19 March 2015 (not issued in document form)
Date of adoption of Views:	16 February 2018
Subject matter:	Responsibility of State party's authorities to promote the accessibility of a person with disabilities in the context of a private dispute between neighbours
Procedural issues:	Competence *ratione temporis*; exhaustion of domestic remedies; competence *ratione materiae*
Substantive issues:	Accessibility; reasonable accommodation; general obligations of States parties under the Convention
Articles of the Convention:	3, 9, 14, 19, 25, 26 and 28
Articles of the Optional Protocol:	2 (c), (d) and (f)

1.1 The author of the communication is Viktoria Bacher. She submits the complaint on behalf of her brother, Simon Bacher, an Austrian national born on 1 January 1990, in her capacity of legal guardian.[1] The author claims that Austria has violated Mr. Bacher's rights under articles 3, 9, 14, 19, 25, 26 and 28 of the Convention on the Rights of Persons with

* Adopted by the Committee at its nineteenth session (14 February–9 March 2018).

** The following members of the Committee participated in the examination of the communication: Ahmad Al Saif, Danlami Umaru Basharu, Monthian Buntan, Imed Eddine Chaker, Theresia Degener, Samuel Njaguna Kabue, Hyung Shik Kim, Stig Langvad, Robert George Martin, Martin Babu Mwesigwa, Coomaravel Pyaneandee, Valery Nikitich Rukhledev and Damjan Tatic.

[1] See decision of 4 April 2012 by the Schwaz District Court.

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Disabilities. Austria acceded to the Optional Protocol to the Convention on 26 September 2008.

1.2 On 17 April 2015, the Committee, acting through its rapporteur on new communications decided to examine the admissibility of the communication together with the merits.

A. Summary of the information and arguments submitted by the parties

The facts as presented by the author

2.1 Mr. Bacher was born with Down's syndrome. He is on the autism spectrum and occasionally needs a wheelchair. He also has a chronic pulmonary condition and immunodeficiency that require regular medical assistance, for which he regularly visits the University Hospital in Innsbruck.

2.2 Mr. Bacher lives in the town of Vomp, in a house that his family bought in 1983. The house, and the two neighbouring houses, are only accessible by a footpath. When Mr. Bacher's parents bought the house, the Mayor of Vomp told them that it was his legal duty to have an emergency access built to their home and the two neighbouring houses, to ensure accessibility for example in the event of a fire. However, since that Mayor left office, nothing has been done with respect to the new means of access. Mr. Bacher's parents have constructed wooden steps filled with gravel along the footpath, which has an 18 per cent gradient, is 35 metres long and between 1.2 and 1.5 metres in width, and remains the only way to gain access to the house. When it rains, snows or hails, the path becomes particularly dangerous for Mr. Bacher and the persons who help him. As he grew, his parents became unable to carry him and decided to build a roof over the path to protect it from bad weather. Planning permission was granted by the local authority to build such a roof, with the agreement of the immediate neighbours. However, the owners of one of the neighbouring houses (Mr. R and his uncle) were not invited to attend the meeting to discuss the planning permission, as by law only those neighbours living within 15 metres of the place of the construction needed to be consulted. In compliance with the licence granted by the Vomp municipality, and with a grant from the Tyrol local government, a roof was built between November and December 2001.

2.3 Mr. R sued the author's parents before the Schwaz District Court, claiming that the roof had reduced the width of the path from 1.5 to 1.25 metres and that its height violated his right of way. On 17 July 2002, the Court decided in favour of Mr. R and ordered that the roof be demolished.

2.4 The situation of Mr. Bacher and his family became the subject of two television programmes, in 2003 and 2004. His parents lodged an appeal before the Innsbruck Regional Court, claiming that the sole purpose of the roof had been the safety of Mr. Bacher, and requesting to take into account his disability and personal circumstances. In 2003, the Mayor was informed about the availability of an alternative path that had been closed and could serve to gain access to Mr. R's house, thereby resolving the problems Mr. Bacher faced in gaining access to his home. However, the same year,[2] a local businessman purchased an adjacent plot in order to build a wall and fence to block the entrance to his property, and the alternative path was closed. On 2 April 2003,[3] the Innsbruck Regional Court upheld the decision of the Schwaz District Court and set the value of the claim at more than 4,000 euros, thereby preventing any appeal to a higher court. The roof was scheduled for destruction in December 2003, and on the day of demolition,[4] a court official, the neighbour's lawyer and several builders arrived on the property. However, because of an intervention by five members of the non-governmental organization People First[5] who had come to support Mr. Bacher and his family, the builders refused to demolish the roof. On 2 April 2004, a group of builders came to the property unannounced and, in the absence

[2] No specific date is provided.

[3] In the complaint, the author always gives the date on which the court decisions were received.

[4] No precise date is provided.

[5] No further information is provided on this organization.

of any court official, removed the roof. Mr. Bacher's family called the police and the Mayor's office, but nobody came.

2.5 After the case received renewed media attention, a lawyer offered his assistance free of charge to the family and submitted a complaint against the removal of the roof in the absence of a court official, and against the workers' trespass on the property. In the complaint, Mr. Bacher's family presented the risks that he faced as a person with disabilities following the removal of the roof. On 16 July 2004, the Schwaz District Court held that Mr. Bacher's family was "committed to accepting the dismantling of the roof",[6] making no reference to the safety allegations or the specific needs of Mr. Bacher. On 1 October 2004, Mr. Bacher's parents appealed against that decision. On 22 April 2005, the Court rejected the appeal and ordered the Bacher family to pay the full cost of the demolition of the roof, without making reference to the allegations as to the way the destruction was carried out, or as to the consequences of the destruction for Mr. Bacher.

2.6 In July 2004, a hailstorm caused further damage to the path. The Tyrol local government granted aid for the repair work but, because of the previous ruling of the Innsbruck Regional Court, Mr. R had to be consulted before any reparation could be done on the path. He refused the aid offered by the government. As a result, the path, which was in a very poor state, could not be repaired. In October 2006, Mr. Bacher's mother fell and broke her arm while helping Mr. Bacher come down the deteriorated path.

2.7 During that period, Mr. Bacher began outpatient treatment for cystic fibrosis, which increased his need to use the path. To resolve their situation, on 21 August 2003, Mr. Bacher's parents petitioned the Ministry of Justice, which replied that it could not scrutinize the judgment of the Court. They then tried to negotiate privately with the neighbour, who refused all contact. They requested the support of People First. After the 2 April 2003 decision by the Innsbruck Regional Court, lawyers from the District Court who specialized in disability issues worked with the Red Cross to find a solution, and suggested a collapsible roof, but the local government replied that such a roof could give rise to a legal complaint and rejected the option. Late in 2006, the neighbour put his plot up for sale; on 11 January 2008, the above-mentioned local businessman offered to buy it, but his offer was rejected by Mr. R and his uncle. Shortly after, the untimely death of the businessman brought to an end all negotiations related to the purchase of the land.

2.8 In June 2008, the Chair of the Tyrol Green Party contacted the Tyrol land regulations department, which arranged to meet with the Mayor on 29 July 2008. The Mayor did not attend the meeting. The Chair then contacted the land regulations department and offered to buy Mr. R's plot in order to build an edifice for a social project, but was informed that the plot was non-building land. The Red Cross then suggested building a road to improve the alternative path, which required purchasing a two-metre-wide section of the businessman's land. On 13 October 2008, the offer was rejected by the businessman's heir. The Governor of Tyrol was contacted by the family, but he did not respond. On 18 November 2009, the family contacted the Governor again, and were informed that Mr. R was not interested in finding a solution and that there was no hope for another hearing. They therefore stopped all contact. Mr. R. verbally threatened to sue the family for "professional damage" if they pursued any kind of action related to the original path.

2.9 Between 2011 and 2012, the Disability Ombudsman attempted to mediate with the Mayor of Vomp, who suggested that Mr. Bacher should be placed in a home or that the whole family should move away. Two more television programmes were aired, in which the Minister for Justice and the Ombudsman appeared. In the 2012 programme, an email sent by the Mayor was read aloud, which stated again that Mr. Bacher should be moved to a home for persons with disabilities, or the family should move.

2.10 The family refuses to institutionalize Mr. Bacher. As regards the suggestion that they should move, the author submits that the family home provides Mr. Bacher with a familiar environment and the stability he needs as a person on the autism spectrum. In addition, the family home is close to the day centre that Mr. Bacher attends, and the University Clinic where he receives his weekly treatments. The author adds that Tyrol is a

[6] Unofficial translation provided by the author.

very expensive area and that the family could not afford to move to a similar abode, because their house has been highly devalued following the destruction of the path and the resulting lack of safe access to the building.

2.11 In November 2009, Mr. Bacher's family obtained free legal assistance through their insurance company. The lawyer brought a case against the neighbours requesting that they make a financial contribution to the repair of the path, arguing that, had the roof been kept, the path would not have fallen into disrepair and Mr. Bacher could have used it safely. On 9 February 2012, the Schwaz District Court ruled against the family on the grounds that the neighbours barely used the path and were therefore not responsible for its maintenance. Mr. Bacher's family did not appeal against that decision because they had understood that no further remedy was available, and they had already lost 30,000 euros. In May 2014, Mr. Bacher's family contacted the Mayor of Vomp to report that the neighbour had started to use the path frequently. The Mayor refused to take any action and suggested that the family contact the judge of the Schwaz District Court. On 28 May 2014, the judge replied that the case "had nothing to do with the rights of persons with disabilities"[7] and that it was the family's use of the path that had damaged it.

The complaint

3.1 The author claims that the State's overall failure to consider Mr. Bacher's situation and to understand the "paradigm shift created by the human rights-centred approach in the Convention" (see CRPD/C/AUT/CO/1, para. 21) constitutes a violation of his rights under articles 3, 9, 14, 19, 25, 26 and 28 of the Convention.

3.2 She submits that, although the roof was removed prior to the entry into force of the Convention and the Optional Protocol in the State party, the violation of her brother's rights is ongoing because of the decisions adopted by State party's authorities after the entry into force of the Convention and the Optional Protocol.

3.3 Regarding article 3, the author claims that her brother's rights to be treated with respect and dignity and to participation and inclusion have been systematically ignored. Regarding article 9, she claims that Mr. Bacher's right to accessibility has been violated by the courts through their decisions, by which they have prevented his family from taking the measures necessary to protect the path and enable its safe use. In particular, the 2012 decision was adopted taking into account the previous decisions, but not taking into account Mr. Bacher's disability. The author claims that her brother's rights to liberty and security under article 14 have been violated because the unsafe condition of the path prevents him from leaving his house in bad weather conditions.

3.4 The author further claims that her brother's right to live independently has been affected by the lack of access to his home, which has reduced his personal and independent mobility, in violation of article 19 of the Convention. Mr. Bacher's rights under articles 25 and 26 to have access to health services and rehabilitation have also been violated because the unsafe condition of the path has prevented him from attending his treatments in bad weather conditions.

3.5 Regarding article 28, the author claims that the lack of safe access to the family home and the great costs of the unfruitful proceedings have violated her brother's right to an adequate standard of living.

State party's observations on the admissibility

4.1 On 18 February 2015, the State party transmitted its observations on admissibility. It considers the communication inadmissible because the facts occurred prior to the entry into force of the Optional Protocol, because domestic remedies have not been exhausted and because the rights guaranteed by the Convention were not invoked during the domestic proceedings.

4.2 The State party submits that the construction of the roof and all pertinent proceedings took place before the Optional Protocol came into force, on 26 October 2008.

[7] Translation of the original German text in the letter from the judge dated 28 May 2014.

It therefore considers that the communication should be declared inadmissible pursuant to article 2 (f), of the Optional Protocol.

4.3 The State party further submits that the author has not exhausted all domestic remedies, as although the Innsbruck Regional Court in its appellate judgment of 2 April 2003 held that the ordinary further appeal was inadmissible, the Code of Civil Procedure provides that a party may file a request with the appellate court to amend such a verdict and declare an ordinary further appeal admissible. Even when the appellate body holds that the ordinary further appeal is inadmissible, domestic remedies are only deemed to be exhausted if the request has been filed. The State party further maintains that the Innsbruck Regional Court did not amend the amount in dispute, which was assessed at 4,360.37 euros in both instances.

4.4 Moreover, Mr. Bacher's parents were able to appeal against the Schwaz District Court judgment of 8 July 2004. They did not explain why they did not do so.

4.5 The State party further submits that the author's parents did not appeal against the Schwaz District Court decision of 9 February 2012 and considers that the author's submission that no appeal is possible and that the family has lost faith in the Austrian legal system relates to the risk of costs and the family's doubts concerning the effectiveness of such an appeal. The complaint does not allege that there was a risk of excessive procedural duration or that no effective redress could have been expected. The State party notes that Mr. Bacher's family did not contact the insurance company for the payment of costs and that they did not apply for legal aid. The State party further submits that no violation of the Convention has been alleged before domestic authorities.[8]

Author's comments on the State party's observations

5.1 On 31 March 2015, the author submitted her comments on the State party's observations. She reiterates that, although the roof was removed prior the entry into force of the Optional Protocol, the violation of her brother's rights is ongoing through the decisions of the judicial and administrative authorities as they focus their decisions on property rights, without taking into account Mr. Bacher's rights as a person with disabilities.

5.2 The author reiterates that the roof was only built after permission was granted by the Mayor of Vomp. The family sought legal advice from a local government lawyer and a practising lawyer, who both gave assurances that, in case of legal action by the servitude holders, the presiding judge would have to accept the performance of necessary safety maintenance on a particularly deteriorated path, in particular to attend the needs of Mr. Bacher.

5.3 With regard to the State party's argument as to the failure to exhaust domestic remedies, the author submits that the lawyers consulted said that no effective remedies were available, and that the authorities would continue to base their decisions on the contractually granted servitude, without taking into account Mr. Bacher's safety and needs as a person with disabilities. After the Innsbruck Regional Court decision of 2 April 2003, the family's lawyer maintained that, as the verdict was final, an appeal was not possible. The family also sought advice from a public prosecutor, a local government lawyer, the Tyrolean Law Society and the Ministry of Justice, all of which confirmed that no further remedies existed.

5.4 Regarding the allegation by the State party that Mr. Bacher's family did not appeal against the Schwaz District Court decision of 8 July 2004, the author submits that they have attempted to seek the correct legal advice throughout Austria, but that all the experts[9] advised them not to do so. She submits that the judicial authorities clearly did not demonstrate any interest for her brother's disability and that further appeals would have been financially burdensome.[10]

[8] The State party refers to *S.C. v. Brazil* (CRPD/C/12/D/10/2013), para 6.5.

[9] Including a government representative on disability, a government lawyer on disability, a judge from the Innsbruck Regional Court.

[10] The two court hearings cost 5,688 euros.

5.5 As regards the State party's argument that Mr. Bacher's family did not appeal against the judgment of 9 February 2012, the author submits that they had contacted the insurance company and were told there was no reason to reactivate the case because it had been dismissed. The author challenges the statement by the court that the family had caused severe damage to the path by driving on it using a vehicle with "caterpillar" tracks and a "motorcycle"; she states that, in fact, they had only used a garden crawler and a moped. She asserts that the path was in fact damaged because of exposure to bad weather, which would have been avoided if the roof had been in place. She further underlines the contradictions of the neighbour's position: in the 2002 proceeding, he first said that he needed to use the path on a regular basis, while at the 2012 court hearing, he stated that he had not used it in winter for the previous 15 years.

5.6 Regarding the argument of the State party that no reference had been made before the domestic courts to any violation of the Convention rights, the author submits that her brother's disability was mentioned at all court hearings and was witnessed by several experts who took part in the proceedings. The consequences of the lack of protection of the path on his capacity to move to and from the family home were at the core of all the legal proceedings.

State party's observations on the merits and further observations on admissibility

6.1 On 21 July 2015, the State party submitted further observations on the admissibility and merits of the complaint. It argues that the communication is based on civil proceedings with regard to the pedestrian and vehicular right of way (easement) granted to the owner of a neighbouring property (the entitled party) on the property owned by the Mr. Bacher's father (the obliged party). This right was established by contract between the legal predecessors of the current owners in 1953 and 1955. Mr. Bacher's father had a wooden roof built to cover the only existing private access path leading from the municipal road to his house. In that respect, Mr. Bacher's father had wished to provide him with easier access to the house, in particular in winter. Subsequently, the owner of a neighbouring property filed a complaint arguing that the wooden structure covering the path made it impossible for him to exercise his contractual right to use the path with a vehicle. After reviewing the case carefully, the courts concluded that the wooden structure did violate the easement granted to the owner of the neighbouring property and had to be removed.

6.2 The courts established that it would be possible to choose a different wooden structure. However, as Mr. Bacher's father refused to comply with the court order to have the roof removed, the owner of the neighbouring property was allowed to remove it, and Mr. Bacher's father was required to reimburse him for the costs of this removal.

6.3 As to the subject matter of the complaint, the State party reiterates the arguments developed in its observations on the admissibility of the case. It further notes that neither a conciliation nor a judicial procedure pursuant to the Federal Law on the Equal Treatment of Persons with Disabilities was carried out.

6.4 Regarding the author's allegations under articles 3, 9, 14, 19, 23, 15, 26 and 28 of the Convention, the State party submits that article 2 of the Austrian Federal Constitution includes a comprehensive general prohibition of discrimination. Article 7 (1) explicitly stipulates that no person may be placed at a disadvantage owing to his or her disability, and that the federal Government, provincial governments and municipalities are committed to ensuring the equal treatment of persons with and without disabilities in all areas of everyday life. Any disability-based discrimination is thus expressly prohibited.

6.5 Among the measures taken to implement the constitutional prohibition of discrimination is the Federal Law on the Equal Treatment of Persons with Disabilities, which entered into force on 1 January 2006, and which prohibits discrimination against persons with disabilities in private legal relationships in everyday life. Pursuant to paragraph 4 (1) of the Law, no person may be directly or indirectly discriminated against on the basis of a disability. Protection against discrimination also extends to persons who have a close relationship to persons with disabilities. In particular, this applies to cases where persons are subject to discrimination or harassment owing to the disability of a person with whom they have a close relationship. Under paragraph 9 of the Law, violations of the

prohibition of discrimination can give rise to damage claims. Such claims can arise in cases where the elimination of discrimination can be reasonably expected and could be effected without disproportionate burdens. However, such claims must be preceded by an attempt of conciliation before the relevant service department of the Ministry of Social Affairs.[11] Finally, paragraph 8 of the Law stipulates that the federal Government has a special obligation to avoid discrimination in its areas of activity and to take suitable and necessary measures to make its services and offers accessible to persons with disabilities.

6.6 Under paragraph 472 of the General Civil Code, an easement is a limited right *in rem* to use property belonging to another party. That right is usually acquired by means of a contract entered in the property register that grants the entitled party an absolute legal position. The party is protected against interferences with this legal position. The nature and scope of easements are determined by agreement. Contractual amendments, for example in cases where special personal needs exist, can be agreed upon between the parties. Unilateral amendments are not permitted. The obliged party must not take any measures that severely impair, endanger or create additional burden for the entitled party's exercise of the easement. However, the entitled party can change the way in which the easement is exercised. Pursuant to paragraph 483 of the General Civil Code, expenses related to maintaining a property for which an easement has been granted are generally borne by the entitled party. If the property is also used by the obliged party, he or she is required to cover an appropriate portion of the expense. In case of several entitled parties, all users must make a contribution to the necessary expense, commensurate to their share of use of the property.

6.7 As to the merits of the case, the State party considers that the author's allegations are not substantiated and that the complaint does not show why an alternative solution that was considered possible in the conclusions of the Austrian courts would not be reasonable.[12] Moreover, the communication does not explain why it would not have been reasonable to ensure suitable maintenance of the path in order to ensure that Mr. Bacher and his family could gain access to the family home in poor weather conditions without covering the path.

6.8 The State party also submits that it has always strived to help Mr. Bacher and his family, as demonstrated by its financial contribution to the construction of the wooden structure, and that it is reasonable to assume that the State would have helped to maintain in an appropriate condition the private path belonging to Mr. Bacher's father. However, subsidies do not permit any conclusion as to the civil or administrative lawfulness of the subsidized project. It is for the contractor to obtain all required permits and authorizations. The State party refers to the Committee's previous jurisprudence,[13] according to which a building permit merely defines technical and similar building requirements but does not permit the contractor to build on third party's plots of land or to affect or prevent the use of existing easements. It considers that this is another reason why the communication should be held inadmissible.

6.9 The State party further argues that the issues raised by the author do not fall within the scope of the Convention. The communication relates to civil proceedings on the pedestrian and vehicular right of way granted to the owner of a neighbouring property with regard to a property belonging to the author's father. This right of way was intended to enable the neighbour to gain access to his property. The easement represents an "absolute" right and an obligation for the author's father. The roof structure chosen to cover the path made it impossible for the owner of the neighbouring property to exercise his right of way, since the path was effectively narrowed from a width of 1.5 metres, as agreed in 1955, to 1.25 metres, and hence no longer allowed access for a construction vehicle required by the

[11] See Federal Law on the Equal Treatment of Persons with Disabilities, para. 14.

[12] The State party refers to the judgment on 4C 805/01 y 17, p. 10, which it quotes as follows: "would it be possible to maintain a width of 1.50 meter by choosing a different supportive construction". It also refers to the judgment relating to judgment on 4 R 493/02g, p. 10, para. 3 and p. 23, which it quotes as follows: "such a hindrance will naturally not exist if a customary exercise of the rights under the easement is ensured".

[13] See *H.M. v. Sweden* (CRPD/C/7/D/3/2011), para. 7.4.

neighbour. This easement is established under private law, which does not interfere with the private autonomy of individuals requiring special protection.

6.10 The State party submits that, in such a context, it does not have a general positive obligation to protect specific groups of persons and that restrictions can only be imposed if they are provided for by law, following a legitimate and proportionate public interest. A right *in rem* can only be withdrawn completely (namely expropriation) if the need arising from the public interest cannot otherwise be met. The obligations arising from articles 1 and 9 (1) of the Convention do not give rise to an obligation to guarantee that the interests of a person with disabilities per se justify an interference with property rights. In the present case, the obligations of the State party could extend only to private legal relationships in which entities offer facilities and services that are available to the public. They do not extend to purely private matters. In line with this interpretation, the prohibition of discrimination against persons with disabilities stipulated in the Federal Act on the Equal Treatment of Persons with Disabilities is only applicable to private legal relationships in everyday life to the extent that they involve access to and the provision of goods and services available to the public. The facts underlying the present communication therefore do not fall within the scope of the Convention.

6.11 As to the author's argument that the decisions of the Austrian courts caused a disadvantage to her brother on grounds of disability, the State party refers to the Committee's jurisprudence recalling that a requirement or measure that is neutral can also lead to discrimination if a disproportionate number of persons with disabilities are affected by it.[14] It recalls that States parties also violate the prohibition of discrimination by failing to grant different treatment to persons whose situation differs significantly without objective and reasonable justification[15] and that, consequently, not every case of unequal treatment amounts to discrimination. The State party further refers to the Committee's jurisprudence under which States parties enjoy a certain margin of appreciation as to the assessment of the reasonableness and proportionality of accommodation measures.[16]

6.12 The State party therefore argues that, when assessing proportionality, it is necessary to consider whether or not the application of the relevant legal provisions creates substantially greater disadvantages for a protected group or merely creates individual disadvantages. In the present case, restricting the easement of a third party must be qualified as a disproportionate and undue burden. After a careful review of the case, the Austrian courts concluded that the roof structure chosen by the obliged party interfered with the easement granted to the entitled party. However, they held that not every structure covering the path would represent such an interference. The parties' interests could have been reconciled by choosing an alternative structure. The State party concludes that the courts examined the arguments of both parties conscientiously and objectively and that there is no indication of arbitrariness or denial of justice in this context.

6.13 As to the author's claim under article 3 of the Convention, the State party recalls that it governs general principles but not individual rights. Regarding the submitted allegations under article 14, the State party argues that this disposition governs the right to liberty and security and therefore does not apply in the present case, because Mr. Bacher was not deprived of his liberty.

6.14 As regards the author's claim under article 19, the State party argues that it does not come into question because the communication does not refer to services or community support. The author's right to home and family under article 23 and the rights related to health under articles 25 and 27 of the Convention were not the subject of the court proceedings, which were initiated to clarify a legal relationship between Mr. Bacher's father and a third party.

[14] See *S.C. v. Brazil* (CRPD/C/12/D/10/2013), para. 6.4.

[15] See *H.M. v. Sweden*, para. 8.3.

[16] See *Jungelin v. Sweden* (CRPD/C/12/D/5/2011), para. 10 (5); *H.M. v. Sweden*, paras. 8.5 and 8.8; *X v. Argentina* (CRPD/C/11/D/8/2012), para. 8.5; and general comment No. 2 (2014) on accessibility, paras. 25 and 31 (b).

Author's comments on State party's observations on the merits

7.1 The author notes with satisfaction that the State party recognizes the extent of her brother's disability and that the only access to their family home is by the footpath. However, the State party has failed to take into account the special needs of her brother. She further argues that the original width of the path never permitted any access by car. The "roof construction" did not restrict any movement and in fact improved the deteriorated path.

7.2 The author further submits that, at the court hearing of 2002, the judge mentioned Mr. Bacher but considered that the wooden roof supports reducing the width of the path had to be removed within three months.[17] The building of the roof was done after analysing all available alternatives, and the family had obtained a building permit. Mr. Bacher's father had sought legal advice from the local government's lawyer and from a practising lawyer, who all advised that, should the neighbour oppose the construction, the Judge had to accept necessary safety maintenance on a particularly deteriorated path. Following a thorough inspection of the place, the local government gave the family a grant on safety reasons for two thirds of the cost of the roof. The local authorities did not anticipate any problems, and the lawyers considered that a negative decision from the neighbour would violate Mr. Bacher's human rights.

7.3 As regards the State party's arguments that these rights were not claimed before domestic courts, the author recalls that Mr. Bacher's disabilities and needs were thoroughly described in all the hearings and summons in 2002, 2003, 2004, 2010 and 2012. She refers to a statement made by the legal aid lawyer in the court hearing of 2002, in which the lawyer asserted that Mr. Bacher (then aged 12 years) had a severe mobility impairment and held a wheelchair permit; was born with Down's syndrome and suffered from a chronic lung disorder; and, due to his age, it was impossible in snowy or icy conditions to get him to the road. The lawyer stressed the need to create a roof over the pathway access to protect it from snow and poor weather, and that the neighbour's request to remove the roof was immoral, vexatious and against humanity. The roof was built in compliance with the planning permission and the local government had granted 13,000 euros towards the building costs of 20,000 euros to attend to Mr. Bacher's needs. All of those statements and that evidence were ignored by the judge in his ruling.

7.4 The author further refers to the court hearing of 2 April 2003, at which the judge requested Mr. R to explain why he contested the height of the construction. The neighbour replied that he had to carry building material to his "building plot", including a ladder upright, and that he needed to use a digger. Mr. Bacher's father produced photographic evidence that this digger could still manoeuvre under the roof.[18] The author describes the elements taken into account by the court, alleging that false information had been provided by the neighbour, in violation of Mr. Bacher's rights. After the hearing, Mr. Bacher's family was informed by their lawyer that no further remedies were available, as the verdict was final and absolute (*rechtskräftig*). They were also advised that no legal aid would be granted. On 18 August 2003, Mr. Bacher's mother and a social worker from the local government sought the advice of the Public Prosecutor, who said that no further remedy was available. Mr. Bacher's family then consulted the local government's lawyer and three other lawyers, who all confirmed this advice.

7.5 On 2 April 2004, the lawyer who had offered to assist the family free of charge submitted a writ alleging that the roof had been removed illegally. A court hearing took place on 1 July 2004, for which a summons was issued stating that Mrs. Bacher had three children, one of whom was severely disabled and the only access to their home was "like a toboggan run in winter and a riverbed in summer". On 22 April 2005, the court rejected the complaint, and Mr. Bacher's family had to pay the cost of the removal of the roof (approximately 4,000 euros). The court did not show any interest in the safety of Mr. Bacher, and the only solution offered by the neighbour's lawyer was for the family to

[17] See decision of 15 July 2002.

[18] Copies of the photographs are provided.

purchase his client's plot of land. The judge dismissed the case on the grounds that "Mrs. Bacher had to accept the roof was gone".

7.6 Regarding the State party's argument that the family could have appealed this decision, the author reiterates that they were advised that no effective remedy was available. Furthermore, the family had no money left. Mr. Bacher's parents sought support from different organizations for persons with disabilities, but all said that they could not do anything because the verdict was final.

7.7 The author argues that the Tyrolean local government had a key role in the development of the case. Many properties were affected by hailstorms in July 2004, after which the local government offered grants for 50 per cent of repair work, estimated at 9,500 euros. However, due to Mr. R's actions regarding the roof, the local government considered that they had to request his authorization before repairing the path. The neighbour's lawyer replied that Mr. Bacher's family should purchase the allotment plot from his client. Consequently, all assistance from the local government was cancelled.

7.8 As to the argument of the State party that the parties' interests could have been reconciled by choosing an alternative structure to cover the path, the author highlights that none of the alternatives proposed was accepted by Mr. R. When the Red Cross enquired as to the price of his plot, he replied that it was 100,000 euros, an inflated price for an allotment plot. Many meetings took place, correspondence was exchanged, but to no avail. In this context, in letters submitted for a television programme and sent to the federal disability lawyer, the Mayor of the city suggested that Mr. Bacher could be submitted to a specialized home or that the family could move away. He further stated in an article in the *Tiroler Tageszeitung* that he had been involved in the case but that no legal remedy was available. In 2009, the local government replied to Mr. Bacher's family, saying that they had tried to consult the neighbour but that he had replied that he could see no solution and that he refused to have a meeting. The local government therefore decided to close the case. New intents of negotiation were carried out by a lawyer with the support of the Red Cross, but no solution was found. From July 2004 to November 2010, none of the consulted professionals and State representatives suggested any of the remedies referred to by the State party.

7.9 As regards the hearings of 2010 and 2011, Mr. Bacher's parents were informed in 2007 that, under General Civil Law, all holders of a servitude must contribute to maintenance. At the end of 2009, they received the agreement from their insurance company that they could sue the holders of the servitude on the path. Correspondence was exchanged between the Red Cross and lawyers. The Red Cross pointed out that the rebuilding of the roof would avoid the servitude holders having to pay the expensive maintenance they have to provide during winter to clear snow and ice. A meeting was requested but was declined. A summons was therefore issued, making reference to Mr. Bacher's disability and his specific needs for safe access. Two court hearings took place. The claims were dismissed on the grounds that the servitude holders had stated that they had never used the path in winter in the previous 15 years, contrary to what they had said in 2002 when requesting the removal of the roof.

7.10 As to the court's argument that the Bacher family had damaged the path themselves by driving on it using a vehicle with "caterpillar" tracks, photographic evidence was produced in court demonstrating that the damage had been caused by hailstorms in 2004. Nonetheless, Mr. Bacher's family had to repair the whole path in compliance with the 2010 decision. As no steps could be built because of Mr. R's position, the snow and ice continue to prevent Mr. Bacher from using the path safely in winter. Three professional witnesses were consulted, all of whom concluded that the only safe option was to cover the path again with a roof. Their testimony was presented to the court but they were not referred to in the adopted decision. None of the adopted decisions took into account Mr. Bacher's rights; instead, the family was left to bear all the costs and pressure that has resulted from the situation.

7.11 Regarding the State party's argument that Mr. Bacher's family had failed to exhaust domestic remedies, the author reiterates that no such remedies were mentioned by the lawyers they consulted.

7.12 The author notes that, according to the State party, only in the course of the proceedings regarding the action for removing the roof construction did Mr. Bacher's father refer to his son's disability. In fact, Mr. Bacher was mentioned at all times of the procedures, including by three professional witnesses. In the last court hearing, questions were raised as to how he gets to the day-care centre or any other place to carry out his daily activities. His "handicap pass" was produced as an important piece of evidence to explain why the roof would have been necessary. However, no adequate assessment of the reasonable accommodation proposed (i.e. the construction of the roof on the path) was made, and all the decisions taken by the courts seem to support the position expressed by the neighbour's lawyer in the 2002 hearing that "the question of the regrettable disability of the defendant's son is not relevant in law".

B. Committee's consideration of admissibility and the merits

Consideration of admissibility

8.1 Before considering any claim contained in a communication, the Committee must decide, in accordance with article 2 of the Optional Protocol and rule 65 of the Committee's rules of procedure, whether the case is admissible under the Optional Protocol.

8.2 The Committee has ascertained, as required under article 2 (c) of the Optional Protocol, that the same matter has not already been examined by the Committee or has been or is being examined under another procedure of international investigation or settlement.

8.3 The Committee notes the State party's submission that the complaint should be held inadmissible pursuant to article 2 (f) of the Optional Protocol because the facts referred to occurred before the entry into force of the Optional Protocol in the State party. The Committee also takes note of the author's claim that the facts that are subject to her communication continued after the entry into force of the Convention and the Optional Protocol in respect to the State party, insofar as it refers to decisions or official statements of State party's authorities adopted from 2009 to 2014.

8.4 The Committee recalls that, in compliance with article 2 (f) of the Optional Protocol, the Committee cannot deal with events that occurred prior to the entry into force of the Convention for the concerned State party, "unless those facts continued after that date". The Committee notes that the appellate judgment of the Innsbruck Regional Court of 2 April 2003 and the judgment of the Schwaz District Court of 8 July 2004 were adopted before the entry into force of the Convention in the State party. However, it also notes that these decisions were referred to by the author as part of the context in which the 9 February 2012 judgment of the Schwaz District court was adopted, and in which the judge of the Schwaz court sent his reply dated 28 May 2014 to the new request for support from the family of Mr. Bacher.

8.5 The Committee notes that, although the decision of 9 February 2012 mainly addressed the request of the Bacher family for their neighbours' financial support to maintain the path, reference was made to the disability of Mr. Bacher. Furthermore, the Committee considers that this complaint was submitted as an ultimate option after having exhausted all domestic remedies related to the roof and the intrinsically linked issue of the accessibility of the path, and after seeing that no agreement could be found with the concerned neighbours. The Committee therefore considers that the 2012 judgment and the 2014 official reply must be read in the context of the accessibility issue that is at the core of all the procedures initiated by the Bacher family and can therefore not be disassociated from the decisions of the Innsbruck Regional Court of 2003 and of the Schwarz District Court of 2004, by which they rejected the claims of Mr. Bacher's family. The 2003 and 2004 decisions therefore constitute facts that the Committee is requested to take into account as part of the context of the author's complaint.

8.6 In that regard, the Committee finally notes that, in its decision of 2012, the Schwarz District Court did not only examine formal aspects or errors of law in the previous decisions, but it also examined again the family's claim for the contribution of their neighbours to the costs they faced to make the path accessible. Accordingly, the Committee

considers that it is not precluded *ratione temporis* to examine the present communication as some of the facts submitted to it took place after the entry into force of the Convention and the Optional Protocol for the State party.[19]

8.7 The Committee also notes the State party's argument that Mr. Bacher's family failed to exhaust domestic remedies. In that regard, the Committee notes that, according to the State party, Mr. Bacher's parents could have appealed against the 2003 appellate judgment of the Innsbruck Regional Court, even if the appellate body had held that an ordinary further appeal was inadmissible, under section 461 of the Code of Civil Procedure. Under this disposition, a party may appeal to a court to amend its verdict and declare an ordinary further appeal admissible through an ordinary further appeal or, if the subject matter of the proceedings exceeds 30,000 euros, by an extraordinary further appeal. However, the Committee also notes that, under the Code of Civil Procedure, the appellate judgment of 2 April 2003 indicated that the adopted decision could not be revised and that the lawyers and authorities consulted by the Bacher family at that time all confirmed that the decision of the Innsbruck Regional Court was final (*rechtskräftig*). The Committee further notes that the Code of Civil Procedure establishes clear conditions under which such an appeal can be submitted, which do not appear to correspond to the present case. In addition, the State party does not provide any argument that suggests that such an appeal would have had any chance of success. The Committee therefore concludes that the appeal referred to by the State party constitutes an extraordinary remedy that does not have to be exhausted for the purposes of admissibility.[20]

8.8 The Committee notes the State party's argument that Mr. Bacher's parents had been able to appeal against the judgment of the Schwaz District Court of 8 July 2004 and the decision of the Schwaz District Court of 9 February 2012. It also notes the author's argument that the family did not do so because none of the legal experts they consulted told them that they should have appealed against the 2004 decision, and it was clear that the judicial authorities had not demonstrated any kind of interest in or attention to her brother's disability. The Committee further notes that the family consulted lawyers from different parts of the country, who all considered that an appeal would be ineffective, including as regards the February 2012 judgment. In addition, the State party does not provide any argument that allows the Committee to conclude to the contrary, or to consider that the suggested remedies would have any chance of success after more than 10 years of judicial proceedings during which the special needs of Mr. Bacher as a person with disabilities were not considered relevant. The Committee recalls that under article 2 (d) of the Convention, only remedies with a reasonable chance of success need to be exhausted. Accordingly, the Committee considers that it is not precluded from examining the present communication for the non-exhaustion of domestic remedies.

8.9 As regards the State party's submission that Mr. Bacher's family did not allege any violation of the Convention before domestic authorities, the Committee notes that, since the neighbours' initial complaint in 2002 requesting the destruction of the roof, the issue before the courts was always linked to the question of the accessibility of the family home, including for Mr. Bacher as a child with disabilities. In particular, the Committee notes that the 2012 proceedings were initiated by Mr. Bacher's family to request that the servitude holders contribute to the maintenance of the path to make it accessible. The Committee considers that, since this issue was before the domestic authorities, it is not prevented from examining the author's allegations under article 9 of the Convention.

8.10 With regard to the author's other allegation, however, the Committee notes that the information provided does not reflect that Mr. Bacher's family raised these issues before the domestic authorities.[21] In that connection, it notes that, in order to bring a claim before the Committee, an author must have raised them in substance at the domestic level,[22] so as

[19] See *Jungelin v. Sweden*, para. 7.6.

[20] See for example Human Rights Committee, *Alekseev v. Russian Federation* (CCPR/C/109/D/1873/2009), para. 8.4.

[21] See *Noble v. Australia* (CRPD/C/16/D/7/2012), para 7.8.

[22] See for example Committee on the Elimination of Discrimination against Women, *Kayhan v. Turkey*, decision of 27 January 2006, para. 7.7.

to give domestic authorities and/or courts an opportunity to deal with such claims.[23] The Committee therefore finds the author's allegations linked to the liberty and security of Mr. Bacher (art. 14), his ability to live independently and to be included in the community (art. 19), his health (art. 25) his right to habilitation and rehabilitation (art. 26) and to an adequate standard of living (art. 28) to be inadmissible under article 2 (d) of the Optional Protocol.

8.11 As regards the author's allegations under article 3 of the Convention, the Committee recalls that, in view of its general character, this article does not in principle give rise to free-standing claims and can only be invoked in conjunction with other substantive rights guaranteed under the Convention.[24]

8.12 The Committee therefore declares the communication admissible, insofar as it appears to raise issues under article 9, read alone and in conjunction with article 3 of the Convention, and proceeds with its consideration of the merits.

Consideration of the merits

9.1 The Committee has considered the present communication in the light of all the information that it has received, in accordance with article 5 of the Optional Protocol and rule 73 (1) of its rules of procedure.

9.2 As argued by the State party, the pedestrian and vehicular right of way (easement) granted to the neighbours of the Bacher family gave rise to a dispute between individuals (the entitled party and the obliged party), which was not directly initiated by the authorities. In that regard, the Committee notes the State party's argument that the obligations of the State party extend only to private legal relationships in which entities offer facilities and services that are available or offered to the public and do not extend to "purely private matters". However, the Committee also recalls that this type of dispute is governed by the legal order of the State party, which, in any event, bears the ultimate responsibility to ensure that the rights under the Convention are respected, including the right for a person with disabilities to have access to his or her home, but also to have access to community life and to public services, such as education and health. Accordingly, although disputes resulting from the construction of a roof on a path are between two individuals, the State party has an obligation, inter alia, to guarantee that the decisions adopted by its authorities do not infringe upon the rights of the Convention.

9.3 States parties are obliged not only to respect Convention rights and, it follows, to refrain from infringing upon them, but also to protect those rights by adopting measures to prevent the direct or indirect interference of individuals in the enjoyment of those rights. Thus, although the Convention primarily establishes rights and obligations between the State and individuals, the scope of the provisions of the Convention extends to relations between individuals. In that connection, the Committee also recalls that under article 4 (1), of the Convention, States parties undertake to ensure and promote the full realization of all human rights and fundamental freedoms for all persons with disabilities without discrimination of any kind on the basis of disability. To that end, States parties undertake to take all appropriate measures to eliminate discrimination on the basis of disability by any person, organization or private enterprise. A property right issue linked to the exercise of a contract between individuals and the conflict arising from it therefore has to be interpreted through the Convention. Accordingly, when the courts of the State party intervened to resolve the conflict between the parties, they were bound by the Convention. The State party's argument that the communication deals with a dispute that is exclusively between individuals and therefore does not fall under the Convention therefore does not stand.[25]

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[23] See for example Committee on the Elimination of Discrimination against Women, *N.S.F. v. United Kingdom of Great Britain and Northern Ireland*, decision of inadmissibility adopted on 30 May 2007, para. 7.3.

[24] See *Beasley v. Australia* (CRPD/C/15/D/11/2013), para. 7.5.

[25] See Committee on Economic, Social and Cultural Rights, *Mohamed Ben Djazia and Naouel Bellili v. Spain* (E/C.12/61/D/5/2015), para. 14.2.

9.4 The Committee recalls that "accessibility is a precondition for persons with disabilities to live independently and participate fully and equally in society".[26] In compliance with article 9 of the Convention, States parties shall take appropriate measures to ensure that persons with disabilities have access, on an equal basis with others, to the physical environment, to transportation and to other facilities and services open or provided to the public, both in urban and in rural areas. These measures shall include the identification and elimination of obstacles and barriers to accessibility.

9.5 The Committee further recalls that, in compliance with article 2 of the Convention, reasonable accommodation may have to be adopted as necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden to ensure to persons with disabilities the enjoyment or exercise of all human rights and fundamental freedoms on an equal basis with others, including their right to accessibility.[27]

9.6 In that context, the focus is no longer on legal personality and the public or private nature of those who own buildings, transport infrastructure, vehicles, information and communication and services. Persons with disabilities should have equal access to all goods, products and services that are open or provided to the public in a manner that ensures their effective and equal access and respects their dignity.[28]

9.7 The Committee recalls that, when assessing the reasonableness and proportionality of accommodation measures, States parties enjoy a certain margin of appreciation. It further considers that it is generally for the courts of States parties to the Convention to evaluate facts and evidence in a particular case, unless it is found that the evaluation was clearly arbitrary or amounted to a denial of justice.[29] In the present case, the role of the Committee is to assess whether the decisions adopted by the courts of the State party have enabled the respect of the rights of Mr. Bacher under article 9, read alone and in conjunction with article 3 of the Convention.

9.8 The Committee notes the State party's argument that it has always strived to help Mr. Bacher and his family, as demonstrated by its financial contribution to the construction of the wooden structure (see para. 6.8). The Committee also notes that, according to the State party: (a) the easement at stake in the case under review represents an "absolute" right that obliges the author's father; (b) in that context, the State party does not have a general positive obligation to protect specific groups of persons in the core area of civil rights and obligations; (c) restrictions can only be imposed if they are provided for by law, required in accordance with a legitimate public interest and not disproportionate; (d) the obligations arising from article 9 (1) of the Convention do not give rise to an obligation to guarantee that the interests of a person with disabilities per se justify an interference with property rights; and (e) the parties' interests could have been reconciled by choosing an alternative structure to cover the path. In that regard, the Committee notes that the destruction of the roof on the path leading to the house of the Bacher family does not only limit Mr. Bacher's access to his home, but also limits his access to social activities and to the public services that he needs for his daily life, such as education, health institutions and public services at large. It also notes the author's argument that Mr. R did not accept any of the alternatives proposed to cover the path and that, when assessing the situation, the courts did not consider that it was relevant to take into account Mr. Bacher's situation.

9.9 In that context, the Committee notes that, by its decision dated 9 February 2012, the Schwaz District Court adopted the same line as the previous decisions of the courts of the State party in the present case: it did not make a thorough analysis of the special needs of Mr. Bacher, despite the fact that they had been clearly referred to by his parents, as in all previous court hearings and summons. The State party's authorities instead considered that the subject matter of the judicial proceedings "had nothing to do with the rights of persons with disabilities",[30] and focused on the resolution of the property rights issue at stake. The multidimensional consequences of the decisions adopted by State party's authorities on the

[26] See general comment No. 2, para. 1.
[27] Ibid., paras. 25 and 26.
[28] Ibid., para. 13.
[29] See *Jungelin v. Sweden*, para. 10.5.
[30] See letter dated 28 May 2014 of the judge of Schwaz District Court.

accessibility rights of Mr. Bacher were therefore ignored, leaving to his family the responsibility of finding ways to enable his access to his home and to the external public services that he needs for his daily life. The Committee therefore considers that the decision of the Schwaz Court of 9 February 2012, read in the context of the previous judicial decisions adopted by the courts of the State party in the case, constitutes a denial of justice for Mr. Bacher, in violation of article 9, read alone and in conjunction with article 3 of the Convention.

C. Conclusion and recommendations

10. The Committee, acting under article 5 of the Optional Protocol, is of the view that the State party has failed to fulfil its obligations under article 9, read alone and in conjunction with article 3 of the Convention. The Committee therefore makes the following recommendations to the State party:

(a) Concerning Mr. Bacher, the State party is under an obligation to provide him with an effective remedy, in particular:

(i) To facilitate a solution to the conflict related to the use of the path, which is the only means of gaining access to the Bacher family home, taking into account the special needs of Mr. Bacher as a person with disabilities and the criteria established in the present Views;

(ii) To award Mr. Bacher financial compensation for the violations suffered;

(iii) To reimburse the author for the legal costs reasonably incurred in domestic proceedings and in the processing of the present communication;

(b) The State party is also under an obligation to take measures to prevent similar violations in the future. In this perspective, the State party shall:

(i) Ensure continuous capacity-building of the local authorities and courts responsible for monitoring implementation of accessibility standards;

(ii) Develop an effective monitoring framework and set up efficient monitoring bodies with adequate capacity and appropriate mandates to make sure that accessibility plans, strategies and standardization are implemented and enforced;

(iii) Translate the Views of the Committee to the official language of the State party, to publish them and to distribute them widely, in an accessible format, so that they reach all sectors of the population.

11. In accordance with article 5 of the Optional Protocol and rule 75 of the Committee's rules of procedure, the State party should submit to the Committee, within six months, a written response, including information on any action taken in the light of the present Views and the recommendations of the Committee.

Annex

Individual opinion of Damjan Tatić (dissenting)

1. I am not convinced by the Committee's treatment of admissibility *rationae temporis* of the author's allegations of violations of the Convention. The Committee notes that the appellate judgment of the Innsbruck Regional Court of 2 April 2003, and the judgment of the Schwaz District Court of 8 July 2004, were adopted before the entry into force of the Convention in the State party. It also notes that those decisions were referred to by the author as part of the context in which the 9 February 2012 judgment of the Schwaz District Court was adopted. However, the 2012 judgment only related to the claim for payment that the family of Mr. Bacher presented to request the neighbours who had a servitude over the path.

2. The 2012 judgment was therefore not linked with the issue of accessibility and cannot be considered as a continuation or reaffirmation of the decisions adopted before the entry into force of the Convention in the State party. Accordingly, I am of the view that the author's allegations of violations of the Convention are inadmissible *rationae temporis*.